

STATE OF CALIFORNIA

Arnold Schwarzenegger, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR
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November 16, 2005

Arnold P. Schuster, Esq.
Sonnenchein Nath & Rosenthal, LLP
685 Market Street, 6th Floor
San Francisco, CA 94105

Re: Public Works Case No. 2005-034
Woodhaven Manor Apartments
City of Rancho Cucamonga

Dear Mr. Schuster:

This constitutes the determination of the Director of Industrial Relations regarding coverage of the above-referenced project under California's prevailing wage laws and is made pursuant to Title 8, California Code of Regulations, section 16001(a). Based on my review of the facts of this case and an analysis of the applicable law, it is my determination that the Woodhaven Manor Apartments rehabilitation project ("Project") is not a public work, and therefore is not subject to prevailing wage requirements.

The Project entails rehabilitation of 117 units of affordable housing, together with new and improved common area facilities, in the City of Rancho Cucamonga. Pursuant to a Regulatory Agreement between HB Housing Partners, L.P. ("Developer")¹ and the Rancho Cucamonga Redevelopment Agency ("RDA"), occupancy of 100 percent of the units will be restricted, for a period of 55 years, to tenants earning no more than 60 percent of the area median income.

The estimated cost of construction is approximately \$18.6 million. Construction of the Project will be financed by: (a) loans in the amount of approximately \$9.6 million from the California Housing Finance Agency ("CalHFA") of proceeds from tax-exempt multifamily housing bonds allocated by the California Debt Limit Allocation Committee ("CDLAC"); (b) an \$8 million loan from the RDA, payable from cash flow after operating expenses and CalHFA debt service, with a term of 55 years and interest at 1 percent per annum;² (c) cash flow from Project rental and other income in the amount of

¹ Developer is a limited partnership with Southern California Housing Development Corporation, a 501(c)(3) nonprofit corporation, serving as managing general partner and National Housing Development Corporation, also a 501(c)(3) nonprofit, serving as administrative general partner. Related Capital Company will purchase a limited partnership interest in HB Housing Partners, L.P., and will syndicate that interest to private investors who can benefit from the tax credits generated by Woodhaven.

² This loan will be due with interest at the end of the term, and the Project cash flow projections indicate that the loan will be paid at or before maturity.

approximately \$375,000; and (d) federal and state low-income housing tax credits ("LIHTC") of approximately \$610,000, pursuant to Section 42 of the Internal Revenue Code of 1986.

Labor Code section 1771³ generally requires the payment of prevailing wages to workers employed on public works. Section 1720(a)(1) defines public works to include: "Construction, alternation, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds"

Section 1720(b) provides:

(b) For purposes of this section, "paid for in whole or in part out of public funds" means all of the following:

(1) The payment of money or the equivalent of money by the state or political subdivision directly to or on behalf of the public works contractor, subcontractor, or developer.

(2) Performance of construction work by the state or political subdivision in execution of the project.

(3) Transfer by the state or political subdivision of an asset of value for less than fair market price.

(4) Fees, costs, rents, insurance or bond premiums, loans, interest rates, or other obligations that would normally be required in the execution of the contract, that are paid, reduced, charged at less than fair market value, waived, or forgiven by the state or political subdivision.

(5) Money loaned by the state or political subdivision that is to be repaid on a contingent basis.

(6) Credits that are applied by the state or political subdivision against repayment obligations to the state or political subdivision.

(c) Notwithstanding subdivision (b):

(6) Unless otherwise required by a public funding program, the construction or rehabilitation of privately owned residential projects is not subject to the requirements of this chapter if one or more of the following conditions are met:

(E) The public participation in the project that would otherwise meet the criteria of subdivision (b) is public funding in the form of below-market interest

³ Subsequent statutory references are to the labor code unless otherwise indicated.

rate loans for a project in which occupancy of at least 40 percent of the units is restricted for at least 20 years, by deed or regulatory agreement, to individuals or families earning no more than 80 percent of the area median income.

This Project clearly will entail construction and repair work done under contract. The more complex question is whether such work will be paid for in whole or in part out of public funds.

None of the first three funding sources entails any payment out of public funds. Neither the loan funded by the proceeds of tax-exempt multifamily housing bonds nor the RDA loan, even if at below-market interest rates, fall within section 1720(b)'s definition of "paid for in whole or in part out of public funds" because section 1720(c)(6)(E) exempts projects such as this "in which occupancy of at least 40 percent of the units is restricted for at least 20 years, by deed or regulatory agreement, to individuals or families earning no more than 80 percent of the area median income." The cash flow from rentals is a private funding source, and therefore does not constitute payment out of public funds.

The remaining funding source is state and federal LIHTCs. The federal tax credits do not entail payment out of public funds for the reasons set forth in PW 2004-016, *Rancho Santa Fe Senior Affordable Housing Project* (February 25, 2005). Although state tax credits were not at issue in that case, much of the analysis of federal tax credits is equally applicable to them. However, each of the definitions of "payment out of public funds" set forth in section 1720(b) requires a payment or other action "by the state or political subdivision." Thus it is necessary to examine whether state tax credits fall within any of these definitions.

Section 1720(b)(1) provides that "payment of money or the equivalent of money by the state or political subdivision" constitutes payment out of public funds. A tax credit "involves no expenditure of public moneys received or held ... but merely reduces the taxpayer's liability for total tax due." *Center for Public Interest Law v. Fair Political Practices Commission* (1989) 210 Cal.App.3d 1476. Accordingly, the allocation of state tax credits is not a payment of money or the equivalent of money within the meaning of section 1720(b)(1).

Section 1720(b)(3) defines payment out of public funds to include the "[t]ransfer by the state or political subdivision of an asset of value for less than fair market price." LIHTCs "do not constitute a right to a payment of money, have no independent value, and are not freely transferable upon receipt." *Rainbow*

Apartments v. The Illinois Property Tax Appeal Board, 762 N.E.2d 534, 537 (Ill.App.Ct. 2002). Thus a fair market price cannot be assigned to state tax credits, and they are not payment out of public funds within the meaning of section 1720(b)(3).

Section 1720(b)(4) defines as payment out of public funds to include:

Fees, costs, rents, insurance or bond premiums, loans, interest rates, or other obligations that would normally be required in the execution of the contract, that are paid, reduced, charged at less than fair market value, waived, or forgiven by the state or political subdivision.

While the tax credits may reduce Developer's state income tax obligations, these are not "obligations that would normally be required in the execution of the contract." The execution of the contract entails expenditures by, not income to, Developer. The tax credits therefore would reduce tax obligations, if any, on income derived from activities other than construction of the housing.

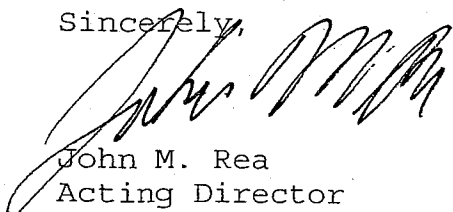
Section 1720(b)(6) defines payment out of public funds to include "[c]redits that are applied by the state or political subdivision against repayment obligations to the state or political subdivision." An income tax is not an obligation to repay money obtained from a governmental entity. Moreover, the state tax credits at issue here are not against any "repayment obligation" pertaining to this Project, but rather will reduce the tax liability that investors incur on income unrelated to the Project.

Thus the state tax credits do not constitute payment out of public funds within the meaning of section 1720(b).

For the foregoing reasons, the Project is not a public work subject to prevailing wage requirements.

I hope this letter satisfactorily responds to your inquiry.

Sincerely,



John M. Rea
Acting Director